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In The

Supreme Court of the United States

OCTOBER TERM, 1967

No. _____

LOUISE McINTYRE,
Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Louise McIntyre, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on June 26, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals, Appendix p. 9, is not yet printed.

The opinion of the District Court, Appendix p. 11, is unreported.

JURISDICTION

The judgment of the Court below, Appendix p. 16, was entered on June 26, 1967. A timely petition for re-

hearing was denied on August 2, 1967. Appendix p. 17. The jurisdiction of this Court is invoked under *28 USC § 1254 (1)*.

QUESTIONS PRESENTED

1. May a statute make proof of possession of a narcotic drug, proof of knowledge that the drug was imported into the United States?

2. May a statute require the defendant to prove her innocence rather than requiring the Government to prove her guilt?

3. When a defendant introduces evidence of lack of knowledge of importation of the narcotic drug into the United States, is the statutory presumption dissipated?

CONSTITUTIONAL PROVISION INVOLVED

FIFTH AMENDMENT

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTE INVOLVED

21 USC § 174.

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

STATEMENT

Petitioner was charged by indictment as follows:

THE GRAND JURY CHARGES:

"On or about the 23rd day of March, 1966, at Portland, within the District of Oregon, LOUISE McINTYRE, defendant, unlawfully, wilfully and knowingly did receive, conceal and facilitate the transportation and concealment of a narcotic drug, that is, approximately 110.670 grams of heroin

hydrochloride, after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law; in violation of Sections 173 and 174, Title 21, United States Code."

Petitioner waived a jury and was tried by the Court. Appendix p. 11.

The issues and the facts to place them in their setting are quoted directly from the opinions below.

"The defendant having admitted the possession of narcotics, a presumption arises under 21 U.S.C. §174, to the effect that possession of the drug is sufficient evidence on which to authorize a conviction, unless the defendant explains the possession to the satisfaction of the trier of the facts. Although the defendant took the witness stand and testified on other subjects, she did not attempt to explain possession of the narcotics. She did testify that she did not import drugs or bring any narcotic drug into the United States and that she did not facilitate the transportation, concealment or sale of a narcotic drug. I observed the manner and the demeanor of defendant while she was on the witness stand and I take her testimony *cum grano salis*. Simply stated, her testimony was unimpressive. The statutory presumption must prevail." Appendix p. 13.

"Appellant's testimony quoted above was found by the trial court to be "unimpressive." We agree. When asked to explain how she obtained the heroin, she refused to explain, relying on the Fifth Amendment." Appendix p. 10.

"Appellant was charged with and convicted of the possession and concealment of a narcotic (heroin chloride) which had been illegally imported into the United States, with knowledge that it had been so imported. She was arrested pursuant to a warrant, and there followed a lawful search. There are but two questions raised: (1) Is the statutory presumption, stated in the second paragraph of 21 U.S.C. §174, that the heroin found in appellant's possession was illegally imported, constitutional; and (2) if it is constitutional, was her statement that she "thought it was made in Portland" (R.T. 51) sufficient to overcome the presumption?" Appendix p. 9.

REASONS FOR GRANTING THE WRIT

Although the statutory presumption contained in *21 USC §174* has previously been upheld by this Court as to opium in *Yee Hem v. United States*, 268 US 178, much critical thought has gone into this area since 1925 which would warrant reconsideration of that decision.

From cases considering other statutory presumptions, such as *Tot v. United States*, 319 US 463; *United States v. Gainey*, 380 US 63, and *United States v. Romano*, 382 US 136, it would appear that the outer limit of a valid statutory presumption is that it accord to evidence, if unexplained, its natural probative force.

The presumption created by the trial judge and held invalid by this Court in *Bollenbach v. United States*, 326 US 607, that possession of items recently stolen in another state created a presumption that the defendant was the thief and the transporter, certainly was no more illogical than *21 USC §174*.

In *Erwing v. United States*, 9 Cir., 323 F2d 674, *21 USC §174*, was held invalid as it applied to "cocaine hydrochloride" because of the expert testimony showing the lack of rational connection. Although there is no expert testimony here, the *United States Pharmacopoeia, 9th edition, page 129*, states that heroin is prepared from morphine, and certainly morphine is an available drug in the United States. Perhaps *Yee Hem* is limited to smoking opium which is only imported?

It seems firmly established that the prosecution has the burden of proving the entire charge of guilt and a defendant need not prove his innocence. *Morrison v. California*, 291 US 82; *Woolmington v. Director of Public Prosecutions* (1935), App. Cas. H. L. 462, 481.

Yet this statute does exactly this as interpreted.

Does it not also violate the privilege against self-incrimination or at least punish one for its exercise? *Griffin v. California*, 291 US 94; *Spivack v. Klein*; 385 US 511, *Garrity, v. New Jersey*, 385 US 498.

This was pointedly apparent in this case where petitioner testified that she did not import narcotics or facilitate the transportation, concealment or sale of narcotics

Appendix p. 13, and that she thought the heroin was made in Portland, Appendix p. 9, but claimed the Fifth Amendment when asked to explain how she had obtained the heroin, Appendix p. 13. This both Courts found "unimpressive." Appendix p. 10, 13.

Her testimony should be considered similar to the raising of the question of sanity. It may be presumed as the normal until some evidence of insanity appears, at which point the presumption disappears and the Government must prove sanity. *Davis v. U.S.*, 160 US 469, 486, 487.

And the fact that the Courts below found petitioner's testimony "unimpressive" does not alter this (Appendix p. 10, 13). Disbelief of her testimony does not amount to evidence to the contrary. *People v. Russell*, 266 NY 147, 194 NE 65. Placing such a burden on petitioner is exactly what makes it unfair in the first place. Certainly few possessors would have any knowledge of the drug's origin or means of ascertaining this. *Morrison v. California*, 291 US 82.

CONCLUSION

This petition for a writ of certiorari should be granted to consider this broad statutory presumption in the light of the later decisions.

Respectively submitted,

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APPENDIX

1. Opinion of the Courts of Appeals for the Ninth Circuit

(Caption omitted.)
June 26, 1967

Before: BARNES and JERTBERG, Circuit Judges; and HILL,* District Judge

PER CURIAM:

Appellant was charged with and convicted of the possession and concealment of a narcotic (heroin chloride) which had been illegally imported into the United States, with knowledge that it had been so imported. She was arrested, pursuant to a warrant, and there followed a lawful search. There are but two questions raised: (1) Is the statutory presumption, stated in the second paragraph of 21 U.S.C. § 174, that the heroin found in appellant's possession was illegally imported, constitutional; and (2) if it is constitutional, was her statement that she "thought it was made in Portland" (R.T. 51) sufficient to overcome the presumption?

The presumption has long been held valid by this and other courts. *Yee Hem v. United States*, 268 U.S. 178 (1925), *Morales v. United States*, 344 F2d 846, 851 (9th Cir. 1965), *Ramirez v. United States*, 350 F2d 306, 308 (9th Cir. 1965), *Juvera v. United States*, (9th Cir.) No. 20,179, decided May 9, 1967, slip opinion p. 8.

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*Hon. Irving Hill, United States District Judge, Central District of California.

Appellant's testimony quoted above was found by the trial court to be "unimpressive." We agree. When asked to explain how she obtained the heroin, she refused to explain, relying on the Fifth Amendment. The presumption may be, but is not necessarily, overcome by appellant's mere statement as to her conjecture. *Chavez v. United States*, 343 F2d 85, 89-90 (9th Cir. 1965), *United States v. Norton*, 310 F2d 718, 719 (2nd Cir. 1962).

Appellant relies heavily on *Erwing v. United States*, 323 F2d 674 (9th Cir. 1963). But the facts differ completely. In *Erwing* a different narcotic was involved, "cocaine hydrochloride." In *Erwing* there was uncontradicted expert testimony that "all cocaine hydrochloride was manufactured in the United States." "Under the evidence" there produced there was held to be "no rational connection between the unexplained possession of cocaine hydrochloride and the presumed fact of illegal importation." *Erwing, supra*, has no application to the facts of this case.

We affirm.

2. Opinion of the District Court for the District of Oregon

(Caption omitted.)

August 17, 1966

KILKENNY, DISTRICT JUDGE:

This cause came on for trial on August 16, 1966, at 9:30 A.M., at which time the defendant knowingly and with full knowledge of her rights, waived a trial by jury and consented to trial by the Court.

Defendant is charged by the Grand Jury of this District with violation of §§ 173 and 174, Title 21, United States Code, i.e. violation of the narcotics laws of the United States of America

On the evidence before me, I find the following facts:

The Grand Jury of Multnomah County, State of Oregon, on March 16, 1966, returned an Indictment, secret in nature, against the defendant, charging her in Count I, with the illegal sale of narcotics (heroin) on or about the 14th day of January, 1966, and in Count II with the illegal possession of narcotics (heroin) on or about the 14th day of January, 1966. Based on the Indictment a warrant was issued by the County Clerk for the arrest of defendant. On March 23, 1966, the said warrant of arrest was executed by an officer of the City of Portland Police Department. Five other officers and federal narcotics agent Weinberg were in the home of defendant at the time of arrest. The officers arrived at approximately 11:00 o'clock P.M. and were admitted

to the defendant's home, after knocking at the door. The warrant of arrest was read to the defendant and the defendant was thereupon placed under arrest. At the time, the defendant and one or more of the police officers were in a bedroom of the home. The arresting officer noticed a handbag on the bed and, as part of a search incident to the arrest, searched the handbag and found several paper bindles, balloons and capsules, all of which contained heroin hydrochloride. To this point, there is little dispute as to what actually transpired. However, defendant does deny that the officers told her, at that time, of her constitutional rights in connection with remaining silent, including that if she spoke such matters could be used against her in a trial, that she was entitled to an attorney and that the court would furnish an attorney in the event she could not afford one. She positively declares that such rights were not explained to her until after she had reached the police station, in custody of the officers.

I find that the search of the handbag and the seizure of the narcotics, exhibits 2A and 2B in the bag, was a search and seizure incident to a legal arrest and that the said narcotics were properly received in evidence. Defendant admits that these particular narcotics were in her possession. The heroin in question was analyzed by a chemist in the Oregon State Crime Laboratory who found and determined that the substance was heroin hydrocholoride .No question is raised as to the proper custody of the heroin in transmitting the material from

the Portland police to the chemist and a proper return for use at the time of the trial, nor is a question raised with reference to the chemist's analysis.

I conclude on these facts that the doctrines taught in *United States v. DiRe*, 332 U.S. 581 (1948) and *United States v. Owens*, 346 F2d 329 (7th Cir. 1965), are applicable and that the Oregon authorities of *State v. Chinn*, 231 Or 259, 267, 373 P2d 392 (1962) and *State v. Broadhurst*, 184 Or 178, 196 P2d 407 (1948), *cert. denied* 337 U.S. 906 (1949), permitted the police to gather and seize the fruits and the implements of the crime. The defendant having admitted the possession of narcotics, a presumption arises under 21 U.S.C. §174, to the effect that possession of the drug is sufficient evidence on which to authorize a conviction, unless the defendant explains the possession to the satisfaction of the trier of the facts. Although the defendant took the witness stand and testified on other subjects, she did not attempt to explain possession of the narcotic. She did testify that she did not import drugs or bring any narcotic drug into the United States and that she did not facilitate the transportation, concealment or sale of a narcotic drug. I observed the manner and the demeanor of defendant while she was on the witness stand and I take her testimony *cum grano salis*. Simply stated, her testimony was unimpressive. The statutory presumption must prevail.

Since this trial was held after the decision in *Miranda v. Arizona*, 384 U.S. 436-545 (1966), the Chief Justice's

Hand Book on ethical police approaches on the questioning of suspected criminals is applicable. Although the officers made a noble effort at compliance, they either did not read or could not understand the Hand Book. Simply stated, the officers did not, until after arrival at the police station, ask enough questions to produce the required waiver of the defendant to the right to an attorney. Part of the formula was followed, but an essential ingredient was missing. At no time, was defendant told that she did not have to talk unless her attorney was present. The officers' statements that she said that she fully understood her rights, must be analyzed in the light of the evident fact that even the officers didn't know the nature and extent of her rights. Consequently, the actions of defendant in assisting the officers in locating the narcotics and other materials in the closet of the home and other declarations made by her, are not to be considered. Likewise, the motion to suppress the evidence obtained from the closet in the home of the defendant, on the occasion of the search in question, is allowed. I find the Government has failed to prove that those acts of the defendant, or those statements made, were willfully, knowingly and voluntarily made by her. Of course, this finding is limited to the fruits of the closet search.

Over-all, I find that the defendant on or about the 23rd day of March, 1966, at Portland, within the District of Oregon, unlawfully, willingly and knowingly did receive, conceal and facilitate the transportation and con-

cealment of a narcotic drug, that is, the heroin hydrochloride contained in Exhibits 2, 2A and 2B, after said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law, all in violation of §§ 173 and 174, Title 21, United States Code.

Summing up, I find that defendant received and concealed and facilitated the concealment and transportation of the narcotic drug as alleged, which narcotic drug had been imported or brought into the United States of America contrary to law and that in doing such act and acts she was doing so with knowledge that the narcotic drugs had been imported or brought into the United States of America contrary to law, and that she did said act or acts knowingly and unlawfully. I find these facts with reference to the narcotic drugs which were possessed by defendant and found and concealed in her handbag.

I find the defendant guilty of the crime as charged.

The matter is referred to the Probation Department of this Court with instructions to provide me with a probation report. The defendant shall report for sentencing at 10:30 A.M. on Wednesday, September 7, 1966.

DATED this 17th day of August, 1966.

John F. Kilkenny
District Judge

3. Judgment of the Court of Appeals for the Ninth Circuit

(Caption omitted.)

June 26, 1967

APPEAL from the United States District Court for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

4. Order Denying Rehearing

(Caption omitted.)

August 2, 1967

Before: BARNES and JERTBERG, Circuit Judges; and HILL, District Judge

Appellant's petition for rehearing is denied.

Stanley W. Barnes
Circuit Judge

Gilbert H. Jertberg
Circuit Judge

Irving Hill
District Judge

Excerpt from Proceedings of Wednesday, August 2, 1967
Before: BARNES and JERTBERG, Circuit Judges; and HILL,* District Judge

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellant filed July 25, 1967, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

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*Hon. Irving Hill, United States District Judge, Central District of California.

5. Judgment of the District Court for the District of Oregon

(Caption omitted.)

September 21, 1966

On this 21st day of September, 1966 came Norman Sepenuk the attorney for the government and the defendant appeared in person and with her counsel Oscar Howlett.

IT IS ADJUDGED that the defendant has been convicted upon his plea of Not Guilty, and a Finding of Guilty by the Court of the offense of unlawfully, wilfully and knowingly receiving, concealing and facilitating the transportation and concealment of a narcotic drug, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law, in violation of Title 21, United States Code, Sections 173 and 174 as charged in the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ John F. Kilkenny,
United States District Judge.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 556

LOUISE MCINTYRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After waiving trial by jury (Pet. App. 11; 1 R. 8; 2 R. 2-5) [1] petitioner was convicted in the United District Court for the District of Oregon on a one-count indictment charging the knowing receipt and concealment of illegally imported heroin, with knowledge of its illegal importation, in violation of 21 U.S.C.

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[1] "R." preceded by volume number designates the two-volume record on file with the Clerk.

174 (1 R. 1). On September 21, 1966, petitioner was sentenced to five years' imprisonment, the minimum term permitted by the statute (Pet. App. 18; 1 R. 13). The court of appeals affirmed, *per curiam* (Pet. App. 9).

Petitioner challenges the constitutional validity of the statutory presumption created by 21 U.S.C. 174,[2] and, alternatively, urges that it can have no probative force in cases, such as this, where the dedendant has testified in her own defense at trial. Neither of these claims—each fully considered and rejected by the court of appeals (see Pet. App. 9-10) —warrants further review in this Court.

The constitutionality of the presumption described in 21 U.S.C. 174 has long been firmly established. See, *e.g.*, *Yee Hem* v. *United States*, 268 U.S. 178; *Brown* v. *United States*, 372 F.2d 478, 479 (C.A. 9); *Lujan* v. *United States*, 348 F.2d 156, 157 (C.A. 10), certiorari denied, 382 U.S. 889; *Jefferson* v. *United States*, 340 F.2d 193, 199 (C.A. 9), certiorari denied, 381 U.S. 928; *United States* v. *Stadter*, 336 F.2d 326, 330 (C.A. 2), certiorari denied, 380 U.S. 945; cf. *United States* v. *Gainey*, 380 U.S. 63, 64-65. Petitioner submits no reasons for departing from these settled prec-

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[2] 21 U.S.C. 174 thus provides in pertinent part:

> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

edents which have not already been canvassed and rejected by the lower courts.[3]

The fact that petitioner testified in her own defense does not detract from the rationality of the statutory presumption. The government's case showed that, incident to her arrest under a warrant, heroin was found in a handbag in petitioner's apartment (2 R. 11-13, 15, 18, 20-24, 34-35, 71). In her trial testimony, petitioner admitted possession of the heroin, but stated that she did not import the drugs and did not believe that they were imported (2 R. 50-51; 2 R. 7). On cross-examination, she refused, on Fifth Amendment grounds, to explain how the drugs came into her possession and how long she had been dealing in heroin (2 R. 52-53, 59). The trial judge who "observed the manner and the demeanor of [petitioner] while she was on the witness stand" rejected her testimony as "unimpressive" and relied on the statutory inference in finding her guilty (Pet. App. 13; I R. 10). The presumption applies unless possession is explained to the satisfaction of the trier of the fact. A defendant does not satisfactorily explain possession

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[3] *Erwing* v. *United States*, 323 F.2d 674, is inapposite. There the court of appeals held that the statutory inference was inapplicable to "cocaine hydrochloride" where uncontradicted expert testimony at trial established that such drug was not imported, but was wholly produced in this country (see 323 F.2d at 677-679, 682). In this case, there was no evidence—except for petitioner's own conclusory allegations—challenging the rationality of the presumption as here applied to heroin. See *United States* v. *Sorenson*, 330 F.2d 1018, 1021 (C.A. 2), certiorari denied, 380 U.S. 945; *United States* v. *Coke*, 364 F.2d 484, 485-486 (C.A. 2).

by the simple device of stating, without any factual support, that he did not import the narcotics and did not believe the narcotics were imported into this country. The trier of the facts was under no necessity of crediting the testimony offered in this case. See *United States* v. *Gibson*, 310 F.2d 79, 82 (C.A. 2); *United States* v. *Norton*, 310 F.2d 718 (C.A. 2).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1967

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